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No. 95-286

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

MISSISSIPPI RIVER TRANSMISSION CORPORATION, MURPHY EXPLORATION & PRODUCTION COMPANY, PENNZOIL EXPLORATION AND PRODUCTION COMPANY, TOTAL MINATOME CORPORATION, NORAM ENERGY CORP. AND ROSEWOOD RESOURCES, INC.,

*Petitioners,*

v.

SECRETARY, LOUISIANA DEPARTMENT OF REVENUE AND TAXATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeal, First Circuit, State Of Louisiana**

## PETITIONERS' REPLY BRIEF

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## RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioners refer the Court to pp. ii-iii of their Petition for a Writ of Certiorari for a list of parties and of all parent companies and subsidiaries (other than wholly-owned subsidiaries) of each party which is a corporation.

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## INTRODUCTION

Petitioners set out in their Petition how the opinion of the Louisiana Court of Appeal fundamentally conflicts with this Court's decision in *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369 (1964) ("*Humble*") and the subsequent decisions of the federal courts consistently applying that decision to the Barksdale enclave. Respondent's Brief in Opposition ("Respondent's Brief") contradicts this Court's opinion in *Humble* by setting out a theory that even the Louisiana Court of Appeal did not have the temerity to adopt, *i.e.*, that Louisiana did not cede exclusive legislative jurisdiction over Barksdale. Then, having attempted to avoid this Court's decision in *Humble*, Respondent argues that the decision of another state supreme court on that state's occupation tax somehow serves to overrule *Humble* and the other, consistent federal court decisions applying *Humble* to Louisiana's repeated attempts to apply its severance tax to production from leases within the Barksdale enclave.

Respondent's Brief only underscores the need for this Court to grant the Petition.

### A. Respondent Fails To Address Petitioners' Reasons For Granting The Petition.

Respondent's Brief, primarily a historical piece, not only fails to refute the significance of this case, but also fails to address many of Petitioners' arguments and avoids discussing altogether most of the pertinent issues and legal authorities. Petitioners suggest in their Petition that this Court should grant the application because:

1) The Louisiana Court of Appeal's decision conflicts with *Humble*;
2) That decision conflicts with *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *reh'd denied*, 390 F.2d 54 (5th Cir.), *and cert. denied*, 390 U.S. 1014, *and cert. denied*, 390 U.S. 1015 (1968) ("*Cocreham*") and with *Tarver v. Wilson*, Civ. No. 90-0043 (W.D. La. May 22, 1990) ("*Tarver*"), both holding that the

Louisiana severance tax is not a Buck Act income tax; and

3) There has been no retrocession by Congress to the State of Louisiana of the jurisdictional power to impose severance taxes within the confines of Barksdale.

Indeed, that this Court's decision in *Humble* is even implicated by, much less conflicts with, the Louisiana opinion in this case is difficult to discern from Respondent's Brief.

Not content to merely brush off this Court's jurisprudence, however, Respondent devotes a multi-colored, pull-out exhibit in its Appendix (Resp. App. at C-10) and a prominent place in its Brief (pp. 6-7) to an argument which not even the Louisiana courts have adopted and which is contrary to this Court's holding in *Humble*. Specifically, Respondent asserts that Louisiana's cession of Barksdale to the United States was not pursuant to the Louisiana cession statute, 1892 La. Acts No. 12, but rather to other Louisiana laws which make no mention of either exclusive federal jurisdiction or the reservation of rights to the State. Respondent implies that in the absence of such a reservation, the State is free to tax anything of value on Barksdale.

In *Humble*, this Court expressly relied on the very Louisiana cession statute Respondent now argues is inapplicable in holding that the United States had exclusive jurisdiction over Barksdale pursuant to the Supremacy Clause and that consequently, absent a specific reservation of the power to tax in its cession, Louisiana lacked jurisdiction to levy an ad valorem tax on property of a private oil and gas lessee on Barksdale:

> When the State and its agencies gave the land to the United States, Louisiana law provided that the United States should have "the right of exclusive jurisdiction" over any land it "purchased or condemned, or otherwise acquired . . . for all purposes, except the administration of the criminal laws . . . and the services of civil process of said State therein. . . . "

*Humble*, 376 U.S. at 371 & n.3 (citing 1892 La. Acts No. 12). Moreover, Respondent's assertion that 1892 La. Acts No. 12 does not govern Louisiana's cession of the Barksdale lands is truly remarkable given the fact that in its brief on the merits in *Humble*, Louisiana not only expressly conceded the applicability of the statute to Barksdale, but also acknowledged that Louisiana's legislative consent to the cession guaranteed "as to the lands donated exemption from all taxation, assessments and charges levied under authority of the State." *See* Brief of Respondent on the Merits at 10, 19, *Humble* (No. 329) ("[T]he consent of the State of Louisiana to the donations, as contained in Act No. 12 of 1892, and as later amended by Act No. 31 of 1942 (embodied in the Louisiana Revised Statutes of 1950 as Title 52 § 1) ceded pursuant to its provisions exclusive legislative jurisdiction to the Federal Government over the lands so acquired.").

Finally, even if, in spite of this Court's holding in *Humble* and Louisiana's concession in that case to the contrary, the state constitutional amendments and statutes upon which Respondent relies were somehow pertinent, they contain neither an express limitation on federal jurisdiction nor an express reservation by Louisiana of the power to tax, one of which is necessary for the state to retain jurisdiction to tax. *See Lord v. Local Union No. 2088, Int'l Brotherhood of Elec. Workers, AFL-CIO*, 646 F.2d 1057, 1059 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1106 (1982) ("The jurisdiction exercised by the United States over federal enclaves is exclusive *unless the deed of cession provides to the contrary* or unless the cession is not accepted in the manner required by law.") (emphasis supplied).[1]

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[1] Respondent also implies that Section 2(k) of the leases in question retroceded the power to tax to the State of Louisiana. (Resp. Brief at 11) As in its discussion of the cession statute, Respondent ignores the fact that this issue was also resolved by this Court in *Humble*. 376 U.S. at 374. Similarly, as stated by the Court in *Humble*, the "fact that the oil and gas leases were issued by the Department of the Interior rather than the Department of the Air Force does not affect the exclusive jurisdiction of the United States." *Id.* at 373 n.4.

Other federal cases following *Humble* and applying the Supremacy Clause hold that Louisiana lacks jurisdiction to tax Barksdale property, including specifically the imposition of severance taxes. In *Cocreham*, the Fifth Circuit clearly followed *Humble* and applied the Supremacy Clause, holding:

> The argument that in its sovereign capacity Louisiana has the power to impose a tax on the severance of oil and gas in a federal enclave collides with the Supremacy Clause. As *Humble* holds, a State may not legislate for a federal enclave within the exclusive legislative jurisdiction of Congress.

382 F.2d 929, *reh'g denied*, 390 F.2d 34, 36.[2]

In view of the reliance on the Buck Act by both the Louisiana courts and Respondent, perhaps the most glaring omission from Respondent's Brief, however, is the complete absence of any reference to or explanation of *Tarver*, the federal district court decision rendered before the Louisiana Court of Appeal decision in this case, which resolved negatively the same federal question the Louisiana Court of Appeal decided affirmatively – whether the amended Louisiana severance tax was an "income tax" under the Buck Act.[3] The Louisiana Court of Appeal decision thus creates a clear conflict with the federal district court decision in *Tarver*, with the result that production from a tract contiguous to several of those at issue here has been held not to be subject to Louisiana severance taxation while production from Petitioners' tracts is subject to the tax.

Louisiana chose not to appeal its loss in *Tarver*, and the reason for this is evident: because the district court's decision

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[2] *Cocreham* was followed in two subsequent Fifth Circuit cases involving the Barksdale enclave as well as by the federal district court in *Tarver*. *See Shell Oil Co. v. Mouton*, 410 F.2d 715 (5th Cir. 1969); *Mouton v. Sinclair Oil & Gas Co.*, 410 F.2d 717 (5th Cir. 1969), *cert. denied*, 398 U.S. 957 (1970).

[3] As the Louisiana Court of Appeal recognized, whether a state tax meets the definition of an income tax under the Buck Act is a question of federal law. 648 So. 2d at 1112 n.4; *Howard v. Commissioners of Sinking Fund of Louisville*, 344 U.S. 624, 628-29 (1953); *United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301, 310 (3d Cir. 1976).

was fully consistent with the Fifth Circuit's decisions in *Cocreham* and later cases, it undoubtedly would have been affirmed. Had *Tarver* been affirmed, moreover, certiorari in this case plainly would have been indicated pursuant to Supreme Court Rule 10.1(c). Louisiana's expedient failure to appeal *Tarver* should not be permitted to change that result. Failure to appeal simply means that, by Louisiana's own choosing, the district court's decision stands as the last word of the federal courts; the conflict between the federal and state courts, and the resulting anomalous disparity of treatment of contiguous Barksdale tracts, remain. Only this Court can correct the error below, resolve the conflict, and restabilize the once settled law in this area.

### B. The Louisiana Severance Tax Is Not An Income Tax Under The Buck Act.

In arguing that Congress specifically retroceded to Louisiana the power to levy its severance tax under the Buck Act, Respondent continues its approach of avoiding any meaningful discussion of the federal decisions directly on point to this case. For example, Respondent's only reference to the Fifth Circuit's opinion in *Cocreham*, which held that the Buck Act did not authorize a previous attempt by Louisiana to impose the same severance tax on production pursuant to one of the same leases involved here, appears in a lengthy quoted passage from the Louisiana Court of Appeal's opinion below. (Resp. Brief at 26) Similarly, as noted above, Respondent never even mentions, much less distinguishes, the federal district court's recent opinion in *Tarver*, which applied the holdings of *Humble* and *Cocreham* to invalidate yet another attempt by Louisiana to impose its severance tax on production from an adjacent, but identical, Barksdale lease and concluded that the amendment to the Louisiana severance tax statute, changing the tax from volume-based to value-based, did not suddenly render it an income tax under the Buck Act. (Pet. App. F at 49a-50a) Respondent's studied avoidance of these cases – cases which dealt with leases on the same federal enclave and invalidated the same Louisiana severance

tax at issue here – reflects its inability to sufficiently distinguish them.

Instead of addressing the only relevant authority, Respondent chooses to rely on the bald assertion that the "Buck Act is applicable to any tax based upon value." (Resp. Brief at 22) This proposition directly conflicts with this Court's holding in *Humble* that Louisiana's imposition of an ad valorem tax on property owned by lessees of mineral rights on the Barksdale enclave – by its very definition a tax assessed on value – violated the Supremacy Clause of the United States Constitution. 376 U.S. at 374.

Moreover, Respondent's definition of an income tax – any tax based on value – completely ignores and clashes with the explicit definition provided by the Buck Act itself: "The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. § 110(c). However, even operating under the incredible assumption that a tax on value is per se a tax on income under the Act, Respondent makes no attempt to explain how the Act retrocedes the power to levy the Louisiana severance tax *on natural gas*, recognizing that the tax on gas had not been amended since the *Cocreham* decision and remains based on volume rather than value.

Respondent attempts to rely on this Court's opinion in *Howard v. Commissioners of Sinking Fund of Louisville*, 344 U.S. 624 (1953), to suggest that the Buck Act is so broad as to encompass almost "any tax." (Resp. Brief at 22) *Howard* provides no support for this proposition, however, as it held that a Kentucky occupation tax that was clearly assessed on *earnings* fell within the Buck Act. 344 U.S. at 629 (holding that under the Buck Act, "Kentucky was free to tax earnings just as if the Federal Government were not there"). Rather, *Howard* supports the contention in the Petition that the Buck Act was intended to cover taxes on taxpayers and their earnings and wages, not taxes on property. (*See* Pet. at 20-22)[4]

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[4] Legislative history reflects that Congress purposely provided a specific definition of income tax that was independent of any labels given such taxes by the

In another of its efforts to distract attention from the several directly relevant federal decisions which contradict its view, Respondent cites as support an opinion by the supreme court of another state interpreting that state's own occupation tax. *See Humble Oil & Ref. Co. v. Calvert*, 478 S.W.2d 926 (Tex.), *cert. denied*, 409 U.S. 967 (1972). Certainly, the opinion of another state's supreme court interpreting that state's occupation tax cannot serve to overrule either this Court's opinion in *Humble* as to the limits on Louisiana's taxing jurisdiction over the Barksdale enclave or the subsequent opinions of the federal courts finding that Louisiana's state severance tax does *not* fall within the Buck Act retrocession.

Moreover, the *Calvert* court was concerned not with a severance tax but with an occupation tax on the business of producing oil and gas. The Texas Supreme Court relied on *Howard* for the proposition, inapplicable here, that "[a]n occupation tax, if measured by receipts or income, is an income tax within the meaning of the Buck Act." 478 S.W.2d at 930.[5] In any event, as Respondent concedes that the question of whether a tax is an income tax under the Buck Act is a question of federal law.

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state legislatures enacting them. S. Rep. No. 1625, 76th Cong., 3d Sess. 5 (1940). "[T]he variations contemplated by the Congress were variations in the name or the form of the state tax, but not variations in the substance of the tax." *United States v. City & County of Denver*, 573 F. Supp. 686, 691 (D. Colo. 1983).

[5] Respondent and the Louisiana Court of Appeal mainly rely on the opinion of the Texas Court of Appeals in that case. 648 So. 2d at 1113. (Resp. Brief at 23-24, 29-30) Although affirming the opinion of the Texas Court of Appeals, the Texas Supreme Court did not adopt its reasoning. *Humble Oil & Ref. Co. v. Calvert*, 464 S.W.2d 170, 175-76 (Tex. Civ. App. – Austin 1971), *aff'd*, 478 S.W.2d 926 (Tex.), *cert. denied*, 409 U.S. 967 (1972).

The district court in *Tarver* found the reasoning of the Texas Court of Appeals – a tax is an "income tax" if it is meant to produce revenue for the state – equally unconvincing when presented with that argument by the State of Louisiana as a basis for finding the Louisiana severance tax fell within the scope of the Buck Act retrocession. As stated by the *Tarver* court "under the Texas Court [of Appeal's] decision, every tax is an 'income tax' within the meaning of the Buck Act." (*Tarver*, Pet. App. F at 50a n.20)

### C. The Amendments To The Mineral Leasing Act For Acquired Lands Do Not Cede Taxing Authority To Louisiana.

Never directly addressing Petitioners' arguments in the Petition that the Mineral Leasing Act for Acquired Lands ("MLAAL") does not contain an express retrocession of taxing authority, Respondent merely reasserts its position that when Congress amended the MLAAL in 1976 to eliminate the exclusion of military lands from the Act, Louisiana became empowered to tax Barksdale property. The cornerstone of Respondent's MLAAL argument is that the savings clause in Section 8 of the MLAAL (30 U.S.C. § 357), which preserves the states' rights to levy lawful taxes on federal lands leased pursuant to the Act, is similar to that contained in Section 32 of the Mineral Lands Leasing Act of 1920 (30 U.S.C. § 189) ("the 1920 Act"). Respondent asserts that because the savings clause in the 1920 Act allows state taxation on federal lands, Louisiana is allowed to tax Barksdale under the MLAAL, since certain military lands may now be leased under the MLAAL.

In order to make the similarities between the two provisions (30 U.S.C. § 189 and § 357) have any relevance here, Respondent must ignore two critical factors. The first factor Respondent ignores is that when Louisiana ceded Barksdale to the United States without reserving the power to tax Barksdale property, it lost its power to tax, and the lands became a federal enclave subject to exclusive federal legislative jurisdiction. As this Court held in *Humble*, absent a reservation by the state of a right to tax in the cession of land and jurisdiction to the federal government, or a specific retrocession of jurisdiction in an act of Congress, a state lacks power to tax property within an area of exclusive federal jurisdiction. *Humble*, 376 U.S. at 374.

In its attempt to sidestep this issue, Respondent quotes extensively from this Court's decisions in *Mid-Northern Oil Co. v. Walker*, 268 U.S. 45 (1925), and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (Resp. Brief at 16-18), interpreting Section 32 of the 1920 Act (30 U.S.C. § 189) as preserving the states' rights to assess lawful taxes on lands leased by the federal government. Neither *Mid-Northern* nor *Commonwealth*, however, involve federal enclaves; the lands involved in those cases were domain lands owned by the government in its proprietary capacity and had not been ceded to the United States pursuant to Article I, Section 8, Clause 17 of the United States Constitution as Barksdale was. As to enclave lands, the law is clear that any state taxation on an enclave, not done pursuant to a right acquired by reservation or retrocession, would violate the Supremacy Clause and would not be a "lawful" tax as contemplated by *Mid-Northern* and *Commonwealth*.

The second critical factor Respondent ignores is the express language of the MLAAL itself that the only taxing right saved by Section 8 is "with respect to properties covered by leases issued under this Act." The leases in question here were not issued under the MLAAL, but rather predated the enactment of the MLAAL and were issued pursuant to Public Land Orders No. 701 and 2178. Thus, Section 8 has no application to this case.

As Petitioners discussed at length in the Petition, the Louisiana Court of Appeal's conclusion that the 1976 amendment to the MLAAL somehow "strengthened" Louisiana's right to impose severance taxes on Barksdale should be rejected, as it was by the *Tarver* federal court in striking down as unlawful Louisiana's attempt to tax minerals severed within Barksdale. (Pet. App. F at 21) Absent an explicit retrocession of taxing power to the State of Louisiana, which no court has held to have occurred with the passage of either the 1920 Act or the MLAAL, Louisiana, having ceded its taxing authority to the United States, is without authority to levy the severance tax in this case. *See Cocreham*, 382 F.2d at 938 (stating that this Court's decision in *Humble* "rested . . . on the general principle that a state lacks authority

to levy any tax in an area under the exclusive jurisdiction of the United States").

### D. Respondent's Brief Demonstrates The Need For This Court's Review.

Petitioners have demonstrated that the Louisiana Court of Appeal's decision is in conflict with and unsettles the law established by this Court in *Humble* and other federal courts, and sanctions Louisiana's most recent attempt in its forty year quest to usurp federal enclave jurisdiction over Barksdale Air Force Base in contravention of the Supremacy Clause. The decision below creates an unseemly anomaly, where the production of two contiguous tracts within the Barksdale enclave under identical leases are subject to two disparate results – the production from one tract being not subject to state severance tax, pursuant to a decision of the federal district court in *Tarver*, applying consistent federal precedent, including this Court's decision in *Humble*; the production from the other tracts being subject to state severance tax, pursuant to the Louisiana Court of Appeal decision at issue here. Only this Court can eliminate this inconsistency and enforce its mandate, ending Louisiana's disregard of this Court's decision and the Supremacy Clause. As demonstrated by Respondent's Brief, such defiance will continue until this Court acts to stop it.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

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